Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and TAX COLLECTOR of said City and County,

Appellee.

BRIEF FOR APPELLEES

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Filed this .... day of March, A. D. 1915.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

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BRIEF FOR APPELLEES

The principal facts on which the orders appealed from were based are sufficiently stated in appellant's brief. We shall have occasion in discussing the assignments of error to refer to one or two parts of the record not mentioned by counsel, but no controversy exists as to the facts underlying appellee Tax Collector's application for said orders.

I.

THEORY ON WHICH ORDER WAS GRANTED.

Before taking up the several assignments of error raised by appellant, a brief statement of the law on which the appellee relied in making his application may be in order. It is found in the Constitution of the State of California and the Political Code.

Article XIII, Section 1 of the Constitution provides:

> "All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property', as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal, and mixed, capable of private ownership."

Section 10 of the same article reads as follows:

> "All property, except as otherwise in this constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law."

The Political Code contains the following provisions:

> "Sec. 3607. All property in this state, not exempt under the laws of the United States, excepting fruit and nut-bearing trees under the age of four years from the time of planting in

orchard form, and grapevines under the age of three years from the time of planting in vineyard form, growing crops, property used exclusively for public schools, free public libraries, and free museums, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, is subject to taxation, as in this code provided; but nothing in this code shall be construed to require or permit double taxation."

"Sec. 3617. * * * The term 'property' includes moneys, credits, bonds (except railroad or quasi-public corporations), stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

"Sec. 3627. All taxable property must be assessed at its full cash value." * * *

"Sec. 3628. The assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, except such as is required to be assessed by the state board of equalization, and *must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian, of the first Monday in March next preceding;* but no mistakes in the name of the owner or supposed owner of real property shall render the assessment thereof invalid." * * * (Italics are ours.)

"Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

"Sec. 3649. Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who

owned or controlled it for such preceding year, may be assessed at double its value."

"Sec. 3881. Clerical omissions or errors or defects in descriptions or defects in form in any assessment-book, when it can be ascertained from the assessment-book or from the assessor's maps or block-books, or from the list furnished by the property owner, what was intended to be assessed, or what should have been assessed, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time after the assessment was made, prior to the sale for delinquent taxes. * * * The date and nature of every such correction shall be entered on the assessment-book opposite said assessment and the written authority therefor shall be filed by the assessor with the auditor as a public record, and he shall make the proper charges or credits in his account with the tax collector. In the City and County of San Francisco the written consent of the city attorney shall have the same force and effect as the written consent of the district attorney."

"Sec. 3885. No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

A reading of the foregoing sections demonstrates that it is the intent of the law of this State that all property shall bear its proper proportion of taxation. In the hands of the rate payers this money would have been subject to taxation. In the hands of the Spring Valley Water Company it would have been subject to taxation. In order that such property should not escape taxation because it was placed temporarily under control of the court, the law goes further and provides (Sec. 3647, *supra*) that it

should be assessed to the agency of the court having immediate possession of the same and the taxes paid under the direction of the court.

In support of this interpretation of the law we quote briefly from the oral opinion expressed by the Court below at the hearing of the application:

> "I do not care anything about the formal method by which this application is made. Here is the whole thing as it strikes me; here is the testimony, here is certain property that is the property of some owner in this State; it is the property of an owner in this State, whoever ultimately he may be determined to be. The property is in the hands of the Court, it being controlled by the Court through the exigencies or through the course of certain litigation. Now, this Court cannot undertake to prevent the State from having its taxes upon that property. I do not care who the owner is; it being in the hands of the Court, the comity that is due between our dual system of government requires that the Court should not stand in the way of the city getting its taxes upon this property; whoever is finally found to be the owner of this property will simply have that property turned over to him minus what he would have had to pay had it been in his own coffers at the time of the levy of the tax. * * * (Transcript of Proceedings at hearing, page 8.)
>
> "The obligation to pay proper taxes upon property is one of the most solemn obligations that a citizen is under. It is for the maintenance of the government, and I think the authorities sustain the proposition as well, that if there is a description of the property which reasonably serves to identify it, that it can be held for the taxes. * * *
>
> "Here is a case where I doubt, had the assessor come and asked me how to assess this property,

> that it would have readily occurred to me how to do it, and I would have in all probability advised him that in my judgment it should be assessed as funds in these various banks. Now that of course does not make it legal if it would not otherwise be so. But it seems to me that it would be an extremely refined technicality that would enable the Court to hold that this description of this property was not sufficient upon which to base a valid tax. I at least would be very strongly disposed to let a higher court determine that it was not. This property should not escape taxation; it is property of citizens of the State. It occupies a very peculiar situation, however, that it cannot be told now whose property it is; it is tangible existent property, but the question as to its ownership is in the clouds." (Transcript of Proceedings at hearing, pages 16, 17.)

The views of the learned judge below are also set forth with great clearness in the oral opinion rendered by him in granting a similar application for payment of taxes on rate moneys impounded in Suit No. 21—*Pacific Telephone and Telegraph Company* v. *City and County of San Francisco.* We quote briefly from that opinion. References are to pages of typewritten copy of opinion:

> "I am satisfied that it falls within the same principle that was held applicable in the Spring Valley cases; that it is, within the provisions of the Political Code, moneys in the hands of the Court involved in litigation, and as such subject to taxation as therein provided. I held in these cases that the fund was not the property of either of the parties to the litigation other than potentially so, the title being *sub judice.* It is a fund accumulated under the circumstances indicated and its destination is wholly subject to the final

determination of the Court—that is, as to whether it is justly the property of the plaintiff or that of the consumers. It is, strictly speaking, property in litigation, and its eventual disposition and ownership cannot be determined until the final decree. But the money is nevertheless subject to taxation; it is within the district; it is a part of the property locally within the City and County of San Francisco which should pay its portion of the municipal taxes, and therefore the tax has been properly levied." (Transcript, pp. 2 and 3.)

II.

THE COURT BELOW DID NOT VIOLATE EQUITABLE DISCRETION IN ORDERING PAYMENT OF THESE TAXES.

We question whether in a Federal Court of Equity the judge should be required to go farther in an application of this kind than to ascertain that the funds in litigation were legally assessable, that they had been apparently assessed in accordance with the spirit of the law and that the taxes thereon had not been paid. If the only questions involved relate solely to the technical correctness of the assessment, the complainant should be permitted to file a protest on behalf of the receivers or depositaries and, with permission of the Court below, bring suit in the State Court to recover the taxes paid under protest, where the technical questions may be passed upon by the tribunal designated for that purpose by Section 3819 of the Political Code—*i. e.,* the Superior Court of the County wherein the taxes were assessed.

In the case of an ordinary receivership, where the receiver was in doubt as to whether the taxes assessed against property in his charge were validly assessed or not, he would pay the taxes under protest and, under leave of court, bring a separate action for their recovery. No reason exists for a different course of procedure in the matter at bar. In other words, the orders made in this matter were merely administrative orders, incidental to the proper administration of the fund while in the hands of a court of equity. It is not a judgment. Complainant is not foreclosed thereby from suing in the name of the depositaries in the State courts to recover taxes paid under protest. In making the orders appealed from the Court below did not necessarily pass on the validity of the assessment. (See oral opinion cited *supra.*) While we admit that the orders made are appealable orders as they finally dispose of the matter so far as the court below is concerned, they were orders made in the exercise of equitable discretion, and we believe that this Court should go no further than to determine whether such discretion was exceeded.

From the standpoint of public policy this view should prevail. An ordinary citizen cannot enjoin the collection of taxes on his property. He must pay them under protest and sue for recovery if he believes them illegally assessed. This rule protects the public treasury from being deprived of the funds necessary to conduct the government. For like reason the court should be justified in requiring a party litigant who makes objection to the assessment of property in

litigation on purely technical grounds to pursue his remedy in the same manner as he would have to act were he actually invested with possession and control of the property.

III.

ASSIGNMENTS OF ERROR.

Having set forth the Appellee's contention with respect to what we believe is the broader view to be taken of these appeals, we proceed to a consideration of Appellant's assignments of error. For convenience, they will be discussed under the same grouping as indicated in Appellant's brief.

A.

THE ASSESSMENT WAS MADE IN ACCORDANCE WITH SECTION 3647 POLITICAL CODE.

It will be noted that under that section, money in the possession of a "county treasurer, of a court, county clerk, or receiver" must be assessed to "such treasurer, clerk or receiver" and the taxes paid under direction of the court. There is no provision in this section for assessing a court as such. Out of respect doubtless for the dignity and convenience of the courts, the law provides that the assessment shall be made to the subordinate officer or agent "in possession" of the fund. The clerk of a federal court

is not a county clerk. Hence the assessment could not be legally made to him. Neither was he, in this case, in possession of either the fund or the credit for the deposit, *i. e.,* the right to draw it out. That right was vested solely in the court and the law provides that the taxes shall be assessed against the particular officer or agent of the court "in possession" of the fund. The fund in this case was in the actual possession of the Mercantile Trust Company and the other banks, subject to the order of the court. It must either be assessed to the banks as receivers, or, and we understand that this is the position taken by Appellant, it must escape taxation.

Was the assessor's designation of the banks as "receivers or depositors," under these circumstances such an informality as should invalidate the entire assessment? We submit that it was not. The banks were designated by the court as "depositaries" to receive and keep intact the property in litigation. Owing to their recognized standing as national depositaries no bonds were required of them. By accepting the deposits they also accepted the responsibility to account to the court for the moneys so received. They were under obligations to hold these deposits until the court should order their disposition, and to pay them out only upon order of the court. In all but name the banks were receivers and exercised the functions of receivers. A receiver has been defined as

> "An indifferent person between the parties to a cause, appointed by a court, to receive or preserve the property or fund in litigation pendente

lite, when it does not seem reasonable to the court that either party should hold it."

Hay v. *McDaniel,* 60 Northeastern 729, 730.

"An indifferent person between parties appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it."

Booth v. *Clark,* 17 How. 322, 331;
Atlantic Trust Co. v. *Chapman,* 208 U. S. 360, 370.

The banks in the matters at bar fulfilled the functions outlined in the above definitions. They were both receivers and depositaries and were thereby distinguished from Appellant's case of a personal receiver who deposits his funds in a bank. (Page 11, Brief).

But outside of these technical distinctions, where one construction of the code section referred to would make this impounded money bear its just share of taxation, while another construction would cause it to escape taxation entirely, that construction of the statute should be adopted which will give effect to its manifest intent, namely, that money in litigation should be taxed. This we conceive to be in accord with the elementary rules of construction.

On page 10 of Appellant's brief it is stated that the deposits in Action No. 15344 were not even in possession of the Court. We controvert this statement by referring to the order quoted on page 10 of the record which states that the amount deposited in Suit No.

15344 can be withdrawn "only on a check, or checks, drawn by a special Master and signed by a judge sitting in this court." Our contention is further borne out by the form of orders of transfer set forth on page 13 of the Record, showing that the court has always treated the moneys impounded in this suit on exactly the same basis as those deposited in the others. Whatever may have been the wording of the original stipulation of the parties the court was not bound by it, and repeatedly exercised authority over the fund without reference to the parties.

The cases cited by appellant on pages 11, 12 and 13 of its brief have no application here. An assessment of personal property to any other than "to the person by whom it is owned or claimed or in whose possession or control it is," is of course a fatal defect —not, as appellant argues, because the name under which it is assessed is the material thing, but because the name serves to identify the owner. In *Lake County* v. *S. B. Q. M. Co.,* 66 Cal. 17, which appellant quotes at length, the court goes on to say (page 21) that if there had been anything in the record to show that Sulphur Bank Quicksilver Mining Company and Sulphur Banks Q. S. M. Co. were one and the same corporation the assessment would have been valid. In *San Luis Obispo* v. *Petit,* 87 Cal. 499, the assessor assessed the plaintiff in the case instead of the receiver and the assessment was held invalid. But in the matter at bar the identity of the authority in whose possession or control these funds were on the first Mondays in March of 1913 and 1914

is not in the least affected by the exact name of the agency of the court to which they were assessed. The funds were in the "control" of the court—that much the record shows clearly. Were it not for the provisions of Section 3647 they might have been assessed to the court in its official capacity. Under the provisions of that section they were assessed to the banks as "receivers or depositaries" of the court in the specified suits. No question of identity arises. No rights of appellant are infringed by this designation. Both the letter and spirit of Section 3647 are subserved by it. The assessment was valid.

As authority for our contention in respect to the assessment of funds in litigation, we cite the decisions in *Los Angeles* v. *Los Angeles City Water Co.,* 137 Cal. 699, where it was said:

> "Under this section of the code (3647) the court was authorized to ascertain the amount of taxes to be paid, and to order that the tax be paid by the receiver, he being in possession of the fund; and the validity of such tax is not affected by the informality of the original assessment. (Pol. Code, Sec. 3885.) In each of the cases provided for in Section 3647 of the Political Code the right to tax 'money and property in litigation' does not depend upon the ownership of the money or property, nor the final result of the litigation, though the ultimate liability of the parties may depend, as between themselves, upon proceedings had after the payment of the tax."

In *People* v. *Lardner,* 30 Cal. 242, the funds in litigation were deposited with the County Treasurer

subject to order of the court. Suit was brought against him for taxes. It was held (page 244):

> "The tax was properly assessed to the defendant as the person having the fund in possession (Act of 1861, Sec. 13, p. 422) and when levied it became a lien upon the fund in his hands. The fund was subject to payment of the tax under judicial direction."

In the matters at bar, the banks instead of the County Treasurer, were the official agents designated by the court to receive the moneys in litigation.

B.

THE ASSESSMENT TO THE BANKS AS RECEIVERS AND DEPOSITARIES DOES NOT VIOLATE THE CONSTITUTIONAL PROVISIONS EXEMPTING BANKS FROM TAXATION EXCEPT ON THEIR CAPITAL STOCK FOR STATE PURPOSES.

Article XIII, Section 14 of the California Constitution provides as follows:

> "The shares of capital stock of all banks, organized under the laws of this State, or of the United States, or of any other State and located in this State, shall be assessed and taxed to the owners or holders thereof by the State Board of Equalization, in the manner to be prescribed by law, in the city or town where the bank is located and not elsewhere. There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the State, of one per centum upon the value thereof. * * *

> This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided."

Now, if this tax were one required to be paid by the banks out of their own income, the situation might be covered by the above constitutional inhibition against local taxation, and by the cases cited by appellant. Such, however, is not the case. The banks are assessed in their official capacity as receivers and depositaries of the court, a capacity which they assumed in fact, if not in form, when they accepted the deposit. The taxes to be paid are to be paid out of the deposit itself, thereby diminishing each bank's liability for the repayment of such deposit by the amount so withdrawn. The situation is very much the same as where any bank depositor is assessed for the amount of his credit at the bank and draws a check on his account to pay the tax. In this case the law (Pol. Code, Section 3647), provides that instead of levying the assessment against the court who is the real depositor, it shall be made against the banks in their official capacity as the agents of the court, and the tax paid upon order of the court out of the funds deposited. The principle is not disturbed by the fact that the dignity of the court is so respected at law that assessments can only be made to its subordinate agents and not upon the court itself. It is not contended that the moneys impounded herein are special deposits in the sense that

the money deposited may not be mingled with the general funds of the banks, but it is contended that the banks are merely the court's receivers, *de facto* if not technically, in the matter and have no discretion in the premises but to pay all or any part of the money so deposited to any person at any time upon an order of the court drawn in accordance with the form prescribed in the temporary restraining order under which the deposit was made. Such being the case how can it be said that these orders withdrawing a part of said deposit is a tax on the banks themselves merely because they are made payable to the Tax Collector? In brief, the banks are not concerned so long as the court makes the orders in due form. It may be observed moreover that the banks have not appeared in opposition to granting the order and alleged grounds of objection which affect only the banks' rights in the premises cannot, with propriety, be raised by appellant.

C.

The third specification of error made by appellant is based on its own opinion as to the manner in which the assessment should have been made.

It appears that the Assessor inadvertently included Suit No. 14275 in his list of cases in which the impounded moneys were assessed, whereas as a matter of fact, no money was impounded in Suit No. 14275. He also included Suit No. 26 in the list for the 1913 assessment, whereas that suit was not commenced until July, 1913, and hence no money was impounded

therein on March 1, 1913. But if no money was impounded in the last two cases no harm was done because none was assessed. The Assessor assessed to each bank the total amount on hand on the first Mondays in March of the respective years in all the cases (Tr. page 29). The total amounts on hand in the Mercantile Trust Company in the suits in which moneys were impounded (Tr. pages 16, 18) correspond exactly with the assessments to that institution (Tr. pages 27, 28). The same is true of each of the assessments to the other banks. The addition of suits numbered 14275 and 26 was mere surplusage and did not affect the validity of the assessment. Section 2885, Political Code, provides that "no assessment is illegal on account of informality".

Nor is the assessment void because the Assessor did not make a separate assessment for each suit to each bank but assessed the total amount on deposit for each year with each bank. The functions of the banks were identical in each case. The apportionment of the taxes, in case some suits should be won by appellant and others lost, is a mere matter of bookkeeping. It is unnecessary to answer appellant's question propounded on page 17 of its brief because in this matter all the suits were in the same court, involving the same parties and the same remedy. The practice adopted by the Assessor greatly simplified the procedure in court and injured no one. Had he adopted appellant's suggested method we would have seventy appeals here instead of fourteen.

D.

For the reasons above stated, the court below did not err in directing payment of taxes in accordance with the gross amount assessed to each bank. The proper apportionment of the same is a bit of administrative detail which can be easily supervised by the court when a final disposition of the moneys impounded in any one or more of the suits is ordered.

E.

The fifth and last specification of errors raised by appellant is peculiar to the appeal in Case No. 2543. Referring to page 33 of the record we find a recital in the preamble to the correctory order made in this case by the court below, that the assessment was originally made to the Mercantile National Bank as receiver and depositary instead of to the Mercantile Trust Company as receiver and depositary. This error was due to an erroneous return made by the former institution (Tr., p. 28). Prior to the payment of taxes to the Tax Collector, however (Tr., page 34), the assessment was corrected on the books by the Assessor and the taxes were paid by the Mercantile Trust Company in compliance with the order drawn on the Mercantile National Bank. Then, in order to correct the informality in the original order, the court made an order correcting the same *nunc pro tunc,* and confirming and approving the payment by the Mercantile Trust Company of the taxes which at the time of said payment appeared on the assessment rolls to

have been assessed to it—as receiver and depositary, of course (Tr. pp. 33-35).

To the foregoing error and correction appellant takes vigorous exception. Proceeding on the same theory as before, appellant contends that the name of the receiver or depositary is the all important thing. If this were an assessment against the Mercantile National Bank as an individual, and the name had been subsequently changed in the manner indicated to Mercantile Trust Company we would readily concede the right of the latter company to protest the assessment. But such was not the case. This was an assessment of moneys in the hands of a court to a receiver *de facto* of that court in its official capacity. The individual name of the receiver sinks into secondary significance as compared with its official designation. The error is corrected. There is nothing in the record to show that the Assessor did not make the correction in the manner provided by law. It must therefore be presumed that he did. The bank that should have been assessed accepts the corrected form of assessment and pays the tax. The court corrects the order *nunc pro tunc* so as to conform with the facts. How, we ask, has appellant been injured? We think counsel has overlooked the spirit of the law in his zeal for the observance of its letter.

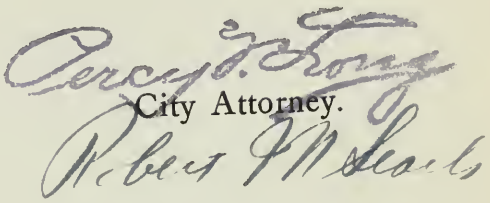
CONCLUSION.

The funds on deposit were, so far as the taxation law is concerned, the property of neither the appellant nor the ratepayers of San Francisco, on the

dates at which they were assessed. They were subject to the control and administration of a court of equity alone. They had escaped taxation for the year 1913. They were not taxable to any person as owner in 1914. Unless they were treated and assessed as "money in litigation" under authority of Section 3647 in 1914, they were bound to escape taxation entirely. They were accordingly assessed, as "money in litigation" to the only parties to whom they could have been assessed under the provisions of said code section, and in compliance with Section 3649, the assessment was made for both years. The court below after considering the question on equitable grounds saw fit to overrule appellant's objections to the validity of the assessment, all of which were based on purely technical reasoning, and ordered the taxes paid out of the funds in question. In so doing it followed exactly the course that any private person owning property would have been compelled by law to follow. The remedies which would have been open to such private owner are still open to appellant—to have the payment made under protest by the banks as receivers and depositaries and, (with permission of the court below), bring suit against the City and County in the proper jurisdiction, in the names of the receivers and depositaries, where the technical questions involved may be adjudicated on issues definitely raised. Furthermore, it is submitted that none of appellant's technical objections are well taken, but that the spirit of the law has been observed in every case.

For these reasons we contend that the discretionary powers of the court below have not been exceeded and that the orders should be affirmed.

Respectfully submitted,



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Solicitors for Appelleees.

Dated March 15, 1915.